HAMZAH ABDUL MAJID & ANOR.

v.

SUNGEI WAY LEASING SDN. BHD.

SUPREME COURT, KUALA LUMPUR
GEORGE SEAH SCJ
SYED AGIL BARAKBAH SCJ
WAN HAMZAH SCJ
[CIVIL APPEAL NO. 275 OF 1984]
26 OCTOBER 1985

CIVIL PROCEDURE: *Appeal from decision of Judge of High Court in Chambers to Supreme Court - Compliance with time requirement of O. 56 r. 2(2) Rules of the High Court 1980 - Meaning of "order" in O. 56 r. 2(2) - Meaning of "order" in s. 68(2) Courts of Judicature Act 1964 - Application for leave to appeal under s. 68(2) - Discretion of the Court.*

This is an appeal against the decision of the High Court Judge, Kuala Lumpur, who dismissed the appeal in Chambers against the decision of the Registrar who gave judgment against the appellants on an application for summary judgment under O. 14 of the Rules of the High Court 1980 at the instance of the respondent.

Counsel for the respondent argued that the appellants had failed to apply for further arguments in open Court within the prescribed time under O. 56 r. 2(2) of the Rules of the High Court 1980 as their application under O. 56 r. 2(2) was made twenty days after the Order was issued.

Held:

[1] As a result of the amendment to s. 68(2) of the Courts of Judicature Act 1964 by the deletion of the word "interlocutory" before the word "order", the word "order" in O. 56 r. 2(2) RHC 1980 includes interlocutory as well as a final order. The decision in *Ng Cheng Yoon v. Mah Binti Mat Isa* [1981] 1 MLJ 218 is no more applicable.

[2] The word "order" in s. 68(2) of the Courts of Judicature Act includes a judgment or any decision of a Judge made in Chambers. The application in this case to the Judge was well out of time.

[3] An application for leave to appeal under the second limb of s. 68(2) must be properly brought and the respondent's Counsel must be given the opportunity to reply on the point. There must be material upon which the Court could exercise its discretion. This appeal was not properly brought to the Supreme Court and since the period of one month has lapsed, the application should now be made to the Supreme Court in compliance with r. 56 RSC 1980.

[Appeal struck out with costs without prejudice to the appellants filing a proper application.]

Cases referred to:

Ng Cheng Yoon v. Mah Binti Mat Isa [1981] 1 MLJ 218
Seldon v. Wilde [1910] 2 KB 9; [1911] 1 KB 701
Arumugam Pillai v. Government of Malaysia [1980] 2 MLJ 283
Tara Rajaratnam v. Datuk Jagindar Singh & Ors. [1981] 1 MLJ 97
Ratnam v. Cumarasamy & Anor. [1965] 31 MLJ 228

Legislation referred to:
Courts of Judicature Act 1964 ss. 68(2), 68(1)(a), 68(1)(b), 68(1)(c)
Rules of the High Court 1980, O. 14, O. 56 r. 2(2)
Rules of the Supreme Court 1980, r. 56

For the appellants - G.C. Proctor; M/s. K.P. Woon & Co.
For the respondent - R.D. Rajasingam; M/s. Lewis & Co.

JUDGMENT

Syed Agil Barakbah SCJ:

This was an appeal against the decision of the High Court Judge, Kuala Lumpur, who dismissed the appeal in Chambers against the decision of the Registrar who gave judgment against the appellants on an application for summary judgment under O. 14 of the Rules of the High Court 1980 at the instance of the respondent. Before us Counsel for the respondent raised a preliminary objection on the grounds that the appellants had failed to apply for further argument in open Court within the prescribed time under O. 56 r. 2(2) RHC 1980. In the circumstances, the appeal was not properly brought before the Court and should be struck out. According to the sequence of events as shown in the appeal record, no oral application was made after the learned Judge had dismissed the appeal. The Order of the High Court was subsequently issued on 9 October 1984. A written application dated 2 November 1984 was made under O. 56 r. 2(2) and the learned Judge issued a certificate dated 6 November 1984 that he did not require any further argument in open Court in respect of the said Summons-in-Chambers. It was submitted that the said certificate was issued by the learned Judge on an application made well out of the time by about twenty days.

Order 56 r. 2(2) states:

> Any party dissatisfied with any order made by a Judge in Chambers may apply, at the time the order is made, orally or at any time within four days from the day of the order in writing to the Registrar, for the adjournment of the matter into Court for further argument, and on such application, the Judge may either adjourn the matter into Court and hear further argument, or may certify in writing that he requires no further argument. If the Judge hears further argument, he may set aside the order previously made and make such other order as he thinks fit.

It is clear therefore that the application was made out of time and we are of the view that had the learned Judge been aware of the defect he would not have issued the certificate.

The matter regarding the right of appeal to the Supreme Court against an order of a High Court Judge made in Chambers is governed by s. 68(2) of the Courts of Judicature Act 1964 (the Act) which states:

> No appeal shall lie from an order made by a Judge of the High Court in Chambers unless the Judge has certified, after application, within four days after the making of the order by any party for further argument in Court, that he requires no further argument, or unless leave is obtained from the Supreme Court or from a Judge of the High Court.

The respondent relied on the Federal Court decision in *Ng Cheng Yoon v. Mah Binti Mat Isa* [1981] 1 MLJ 218 in support of their contention that the rule applied only to an interlocutory order and not to a final order of the Judge in Chambers. The judgment in that case relates to specific performances of an agreement for sale of land and was therefore a final judgment. Similarly in the present appeal, the Registrar's order made under O. 14 RHC 1980 was also final. Since that case however, s. 68(2) was amended by the deletion of the word "interlocutory" before the word "order" with effect from 23 February 1982 (see Act

A530). As a result of the amendment, we are of the opinion that the word "order" in O. 56 r. 2(2) RHC 1980 includes an interlocutory as well as a final order of the High Court Judge made in Chambers. The decision in *Ng Cheng Yoon's* case is no more applicable. We hold that s. 68(2) applies to the instant case.

It was further submitted that the word "order" in s. 68(2) cannot refer to "judgment" since s. 68(1)(b) and (c) distinguishes between judgment and order. We do not see any merit in this argument. Unlike subsection (1)(a) and (b) which refer to matters that are non-appealable, subsection (2) refers to a decision of a Judge in Chambers against which an appeal may be brought if certain conditions are fulfilled. We do not think that the omission of the word "judgment" in subsection (2) of the Act is intended to lay a distinction with the word "order" which appears therein. To construe in the sense contended by the learned Counsel for the respondent would give rise to great difficulties which the Judicature Act has put an end to. (see *Seldon v. Wilde* [1910] 2 KB 9; [1911] 1 KB 701). We hold the view that the word "order" in subsection (2) includes a judgment or any decision of a Judge made in Chambers. We are satisfied that the application to the Judge was well out of time.

It has been urged upon us to consider granting leave under s. 68(2) of the Act even though no formal application has been made. So far no leave appeared to have been obtained from a Judge of the High Court or from us as required under the second limb of subsection (2). In support of their proposition, the appellants relied on two decisions of the Federal Court, viz. *Arumugam Pillai v. Government of Malaysia* [1980] 2 MLJ 283 and *Tara Rajaratnam v. Datuk Jagindar Singh & Ors.* [1981] 1 MLJ 97. In the first case, the application for leave of the Federal Court without first applying for leave of the High Court was made on the suggestion of the Court itself which granted such leave to the appellant and proceeded to hear the appeal. In the second case, there was an application by the respondents to dismiss the appeal on three grounds. The appellant applied for amendment of the notice of appeal and memorandum of appeal to comply with the Rules seeking to overcome two of the prayers in the respondents' application. It is clear in both cases there were merits in the appeal which enabled the Court to exercise its unfettered discretion to proceed. In the present appeal however, there was no formal application and no submissions on the merits were made to us. Although in their written submission (which was never asked for) the appellants put forward certain propositions in their endeavour to show special grounds, they are intended to be in support of an extension of time to appeal under r. 56 RSC 1980. An application for leave to appeal has to be properly brought before us and the respondent's Counsel has to be given the opportunity of replying on the point. There must be material upon which we could exercise our discretion. (See *Ratnam v. Cumarasamy & Anor.* [1965] 31 MLJ 228).

In the circumstances, we agree with the preliminary objection and hold that the appeal has not been properly brought before us.

Be that as it may, the appellants have not formally exhausted their remedies to apply for leave to appeal under the second limb of s. 68(2) of the Act. Since the period of one month to appeal has lapsed, the application should now be made to the Supreme Court in compliance with r. 56 RSC 1980. In the circumstances, the appeal is struck out with costs without prejudice to the appellants filing a proper application.

Also found at [1986] 1 CLJ 293